



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT AT ELDORET

CASE NO. 352 OF 2017

WILLIAM KIPNYOR ROTICH.....PLAINTIFF

VERSUS

PAUL KIPROP KARONEY.....DEFENDANT

JUDGMENT

By a plaint dated 11th October 2017, the plaintiff herein sued the defendant seeking for the following orders:

- a) A declaration holding that the plaintiff is the legal and registered owner of all that parcel of land known as NANDI/KAPTICH/233 and defendant's actions amount to trespass and unlawful.
- b) A permanent order of injunction restraining the defendant, his agents, servants, employees and/or any other person acting on his behalf from encroaching, trespassing into, alienating, occupying, cultivating, claiming, leasing or interfering with the plaintiff peaceful possession, occupation and use and/or in any other way whatsoever dealing with the plaintiff's land namely NANDWKAPTICH/233.
- c) Costs and interests.

Counsel amended prayer (b) which had a typing error to read L.R No. NANDVKAPTICH/233 and not NDALAT SETTLEMENT SCHEME PLOT NO. 379. As per the provisions of Order 8 rule 5 of the Civil Procedure Rules.

The defendant filed a statement of defence and counter claim dated 22nd November, 2017 and prayed for the following orders:

- a) Claim/interest to the portion of land measuring 2.8 acres comprised in that parcel of land known as Nandi/Kaptich/233.
- b) That the plaintiff in the counter claim has obtained title and ownership of that portion of land measuring 2.8 acres comprised in that parcel of land No. Nandi/Kaptich/233 by virtue of adverse possession be ordered to delete the name of William Kipkinyor Rotich from the register and amend the map to reflect the area in favor of the plaintiff and issue him with fresh titles to the portion measuring 2.8 acres.

PLAINTIFF'S CASE,

PW1 testified that he is the registered proprietor of land parcel number NAND1/KAPTICH/233 which measures approximately 8.5 acres or thereabout. He produced the title deed to the land, a certificate of official search and demand letter addressed to the defendant as exhibits before the court.

It was PW1's evidence that he was registered as an owner of the suit land on 17th April, 1980 and stated that he bought the suit land from a 3rd party before land adjudication and registration was undertaken. That his registration was 1st registration.

PW1 stated that he later sold to one BENJAMIN TUWEI 2 acres in 1984 and further sold 4 acres to one JOB ROTICH in 1993 whereby he remained with 2.5 acres or thereabout for grazing which he does not reside on. It was further PW1's testimony that when he wanted to sell the remaining portion to Anne Murgun the defendants chased her away. PW1 confirmed that he moved to Baraton in Nandi County in 2005.

It was his evidence that he has never had any case in respect of the suit land with the defendant and that the defendant has his own parcel of land NANDI/KAPTICH/226.

DEFENCE CASE

DW1 Paul Kiprop Karoney testified that his father bought the whole parcel of land in 1971 and that the plaintiff sold the land and remained with 2.5 acres. He further stated that he had planted trees on the suit land but were cut down and produced photographs to illustrate the same.

DW1 admitted having chased away one Anne Murgun because she had her portion somewhere else and that he has been in occupation of the suit land for over 31 years.

On cross-examination, DW1 stated that he has been staying on the suit land for 39 years and that when the titles were issued in 1980, he did not file any objection to the plaintiff being issued with the title. Further that he had no exchange agreement with the plaintiff.

DW2 Kiprotich Bett testified that the plaintiff has not been staying on the suit land as he moved to Olmaroroi. That the defendant planted trees in 1986 but were cut down and the complaint was filed at the chief's office. He stated that it was later resolved that the suit land belonged to the defendant.

On cross examination, he could not tell the land reference number for the suit plot. He further stated that the defendant does not have a house on the suit land but grazes his animals there. Lastly, he stated that he did not have any evidence to show that there was a meeting at the chief's office.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the defendant in his on one hand is claiming title to the suit land by adverse possession and on the other hand that he acquired the land by purchase. That the defendant's pleadings are at variance with the evidence he tendered in Court on the issue of adverse possession and purchase.

Mr. Murgor counsel for the plaintiff further submitted that if at all the defendant's father is the one who bought the land then the defendant is not privy to the sale agreement as he confirmed during his cross - examination that his father was alive and that he is the one who exchanged land with the plaintiff. Further that the defendant's father did not record any statement to give evidence on behalf of the defendant.

It was counsel's submission that the defendant did not produce any written agreement for the sale or exchange of land and that the law of Contract Act provides that any disposition of an interest in land shall be in writing which provision is mandatory.

On the defendant's claim of adverse possession, counsel relied on the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR Murima J.** held that:

"It is by now well settled that parties are bound by their pleadings and that evidence which tends to be at variance with the pleading is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded".

Counsel further relied on the case of the **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** which also cited with approval the decision of the **Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002 where Adereji JSC** expressed himself thus on the importance and place of pleadings as follows:

"... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with averments of the pleadings was to no issues and must be disregarded in fact, the parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on. the issues as joint and avoid any surprises by which no opportunity is given to the other party to meet the new situation "

It was counsel's submission that the defendant's claim for adverse possession must fail as he has not met the ingredients of the doctrine. Counsel cited the case of **Wambugu —v- Njuguna (1983) KLR 173**, where the Court of appeal held that adverse possession contemplates two concepts: Possession and discontinuance of Possession.

It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years".

Mr. Murgor submitted that the defendant stated that he was grazing his cows on the land since 1988, fenced the land and planted trees but admitted that the trees were cut down. That this was collaborated by DW2 who stated that there was a case involving the cutting of trees. It was further counsel's submission that the photographs produced as exhibit were taken in 2017 and yet the trees were allegedly cut in 1988 hence the photographs were of no use.

It was counsel's further submission that the photographs cannot be proof of possession as possession must be open, notorious, continuous, not in secret, without permission of the owner and in a way that the owner is capable of knowing or will have no excuse as to his knowledge.

Counsel relied on the case of **Ernest Wesonga Kweyu versus Kweyu Omuto CA Civ Appeal No. 8 of 1990** where **GICHERU J.A.**(as he then was) in deciding the issue of adverse possession said that ;

"the primary function of a Court is to draw legal inferences from prove facts which inferences are matters of law. Accordingly, while

possession is a matter of fact, any proposition reached from the fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on a given fact. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and occupation must be shown."

Similarly in the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** Kuloba enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;

- a) The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c) The occupation of land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupant.
- d) The non-permissive actual possession hostile to the current owner must be unambiguously exclusive, and with an evinced unmistakable animus possidendi, that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.

Counsel submitted that the defendant has not met these requirements hence the counter claim should be dismissed.

On the issue on the effect of registration, counsel submitted that registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The plaintiff's registration is not in dispute as the defendant admitted as much. The defendant also confirmed that during land adjudication and registration of parcels of land in KAPTICH in 1980 he did not file any objection to the issuance of title to the plaintiff.

It was counsel's submission that the Land Adjudication Act provided for mechanisms for settlement of disputes during the adjudication process and that a party who failed to raise objection at that stage was not allowed to challenge the titles at any other forum. The Court can only cancel the title if an element of fraud is established. Further that the defendant in his defence has not pleaded that the plaintiff acquired title deed to the suit land by fraud and no particulars of fraud have been enumerated.

Counsel therefore urged the court to find that the plaintiff is the legal owner of the suit land and that he has proved his case against the defendant on a balance of probabilities. Counsel further urged the court to dismiss the defendant's counterclaim with costs to the plaintiff.

DEFENDANT'S WRITTEN SUBMISSIONS

Counsel reiterated the evidence of the parties and submitted that the issues for determination are :

- a) Whether the defendant has proved his claim for adverse possession as raised in his defence and counterclaim;
- b) Whether the plaintiff has proved his case for trespass as against the defendants; and
- c) What prayers ought to be issued?

Counsel submitted that the defendant preferred a claim for adverse possession through a counterclaim of which the plaintiff challenged the mode through which the claim was raised but the court vide a ruling delivered on 2nd October 2018 found that the claim was proper and found no need to file a separate originating summons.

Mr. Tororei counsel for the defendant relied on the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR** where the Court of Appeal established the principles to successfully plead adverse possession. It held that the parcel of land must be registered in the name of a person other than the applicant; the applicant must be in open and exclusive possession of that possession of that piece of land in an adverse manner to the title of the owner; and the applicant must have been in that occupation for a period in excess of 12 years having dispossessed the owner or there having been discontinuance of possession by the owner. It also placed the burden of proving adverse possession upon the claimant.

Counsel further cited the case of **Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR 184**, the court held that the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.

It was counsel's submission that the parcel of land is registered in the name of the plaintiff therefore meets the criteria of a claim of adverse possession. Further that the defendant has been in open and exclusive possession of the suit property measuring 2.8 acres in an adverse manner to the title of the owner.

That DWI testified that he has been in occupation of the suit property measuring 2.8 acres since 1986 wherein he planted cypress trees, erected a barbed wire fence, planted fodder for his cattle and where the cows currently graze on and produced photographs to demonstrate his occupation on the suit property.

Mr. Tororei also cited the case of **Haro Yonda Juaie v Sadaka Dzenge Mbauro & another [2014] eKLR**, the court held:

“The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. **The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession.**”

The court must first have regard to the manner and circumstances under which the alleged dispossession or discontinuance of possession was made and whether the occupation by the adverse possessor excluded the true owner. There must therefore be a discontinuance of possession by the owner, or he must have been eliminated from the land followed by the clear actual possession by the claimant”

Counsel therefore submitted that from the evidence tendered, the defendant has demonstrated that he has been in open and exclusive possession and occupation of the suit property for over a period of 12 years by producing the photographs and that the plaintiff did not tender any evidence to refute the assertions.

On the plaintiff's claim for trespass, counsel submitted that it is undisputed that the plaintiff is the registered proprietor of the suit property and that it is also not disputed that the defendants are occupying the suit property measuring 2.8 acres or thereabouts. The issue for determination therefore is whether their occupation was with permission of the plaintiff or whether his occupation amounts to trespass.

Counsel relied on the case of Clerk & Lindsell on Torts, 18th Edition, page 923 paragraph 18-01, trespass is defined as any intrusion by a person, on the land in the possession of another without any justifiable cause. That the onus was upon the plaintiff to prove that the suit property belonged to him and that the defendants entered therein without justifiable cause. Counsel therefore submitted that the defendant has claimed adverse possession and hence the claim for trespass on the plaintiffs property is untenable.

Counsel therefore urged the court to dismiss the plaintiff's suit and find that the defendant has proved his counter claim on a balance of probabilities.

ANALYSIS AND DETERMINATION

The issues for determination in this suit are as to whether the plaintiff has proved his case for trespass and a claim for injunction against the defendant and whether the defendant has proved his claim for adverse possession as per the counterclaim;

From the evidence tendered and the documents produced, it is not in dispute that the plaintiff is the registered owner of the suit land. It is also not in dispute that the plaintiff acquired the suit land during land adjudication and there was no objection to his registration as a legal owner. It is further evident that the title has not been impeached on the ground of fraudulent acquisition. The defendant admitted that the plaintiff is the registered owner of the suit land and that he did not file an objection during the adjudication even though he was an adult by the time the adjudication was being done.

Even though the plaintiff's registration is not disputed, he went ahead and demonstrated that he was the rightful registered owner of the suit land by producing a copy of the title deed. Section 27 of the Land Registration Act protects such titles unless the same is tainted with fraud or mistake. There was no evidence that the title was tainted with fraud or mistake.

Section 25 (1) of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

Section 26 of Land Registration Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as *prima facie* evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except;

- a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section of 108 and 109 Evidence Act provides that the onus of proof lies upon a party who relies on a set of facts or who alleges even if the other party were to remain silent. In the case of **Koinange and 13 Others – Vs - Koinange [1986] KLR 23** the Court restated the cardinal precept of the law of evidence that he who alleges must prove it.

The defendant alleged that there was a sale or an exchange of land but there is no evidence of such sale or exchange. No agreement for sale or exchange was produced to demonstrate the same. This is a case where the defendant is clutching on straws to try his luck with the claim of adverse possession and sale at the same time. The defendant is not sure on what claim to pursue.

Be as it may, the claim of adverse possession is a doctrine of law that dispossesses a legal owner of land by the operation of the law. It is therefore a doctrine that has stringent ingredients which must be proved for a party to dispossess another of their rightfully acquired land. It is not a walk in the park whereby a claimant wakes up one morning and asserts his or her right on someone's land that they have been on it for a period of 12 years and above.

The court should always be guided by the law and ensure that no injustice is occasioned by overlooking the presence or lack of presence of the requisite ingredients that must be proved for a party to be declared an adverse possessor.

The Court of Appeal in the case of **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamataka Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus:-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is *“nec vi, nec clam, nec precario”*, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

The fact that the plaintiff moved to Baraton does not mean that his lack of possession over a long period of time amounted to dispossession of his title. There was no evidence that the defendant was in actual possession of the suit land as he stated that he planted trees which were cut down in 1988 but produced photographs taken in 2017. This was after 29 years; would the tree stumps still be visible or would the suit land be the same? I doubt this kind of evidence.

In the case of **Wanie v Saikwa (No.2) (1984) KLR 2841** the court held that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. The court went further and held that a person who occupies another's person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

In this case I find that the plaintiff has proved his case against the defendant and that the claim for adverse possession by the defendant must fail as he has not met the threshold to be declared as such. The plaintiff's right to enjoy his suit land is protected by the law and the defendant is a trespasser.

Having considered the pleadings, the evidence on record and judicial authorities, I enter judgment for the plaintiff against the defendant and dismiss the defendant's counter claim in the following terms:

- a) A declaration is hereby issued that the plaintiff is the legal and registered owner of all that parcel of land known as NANDI/KAPTICH/233 and defendant's actions amount to trespass and unlawful.
- b) A permanent order of injunction is hereby issued restraining the defendant, his agents, servants, employees and/or any other person acting on his behalf from encroaching, trespassing into, alienating, occupying, cultivating, claiming, leasing or interfering with the plaintiff peaceful possession, occupation and use and/or in any other way whatsoever dealing with the plaintiff's land namely NANDWKAPTICH/233.
- c) Costs and interests to be paid by the defendant
- d) Counter claim dismissed with costs.

DATED and DELIVERED at ELDORET this 17TH DAY OF SEPTEMBER, 2020

M. A. ODENY

JUDGE